RECORD AND BRIEFS

Nos. 16-1436, 16-1540

Supreme Court, U.S.
FILED
SEP 18 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH CIRCUIT AND NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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September 18, 2017

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INTEREST OF THE AMICUS CURIAE[1]

The American Bar Association ("ABA") is the leading national membership organization of the legal profession. The ABA's membership of over 400,000 spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[2]

The ABA's mission is "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus curiae* or its counsel, has made a monetary contribution to its preparation or submission. The Petitioners have granted blanket consent for the filing of *amicus curiae* briefs. Letters of consent by the Respondents to the filing of this brief have been lodged with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

representative of the legal profession."[3] Among the ABA's goals is to "[i]ncrease public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world," to "[a]ssure meaningful access to justice for all persons," and to "[e]liminate bias in the . . . justice system."[4]

Since its founding in 1878, the ABA has worked to protect the rights secured by the Constitution and its system of separation of powers, including the role of the judiciary as a check against arbitrary exercises of Executive and Legislative power. As the voice of the legal profession, the ABA has a special interest in safeguarding, and responsibility to safeguard, the integrity of our legal system. Preserving and promoting robust judicial review of executive action that encroaches on the Constitution's fundamental protections or important statutory protections is an essential aspect of that responsibility.

On January 27, 2017, the President issued Executive Order No. 13,769 (Jan. 27, 2017) (the "January Order"), which, among other provisions, barred entry into the United States by nationals of

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[3] *See ABA Mission and Association Goals*, ABA, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Sept. 12, 2017).

[4] *See id.*

seven overwhelmingly Muslim countries for 90 days and suspended entry of all refugees for 120 days. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017). Following entry of the January Order, the ABA adopted Resolution 10C, which expressed the concern that the order raised "legal, procedural, and rule of law issues"[5] and urged the Executive "[n]ot [to] use religion or nationality as a basis for barring an otherwise eligible individual from admission to the United States."[6]

On March 6, 2017, the President issued Executive Order No. 13,780 (the "Order"), which modifies some of the January Order's provisions but retains the 90-day bar on entry by nationals of six of the seven majority-Muslim countries identified in the January Order and the 120-day bar on entry by refugees. Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). The Order thus raises the same grave concerns as its predecessor—that it is in purpose and effect the "Muslim ban" that the President himself has called it, that it far exceeds the President's statutory authority, and that it transgresses fundamental constitutional bounds.

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[5] *Report to ABA Resolution 10C*, at 5 (2017), http://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/10c.pdf.

[6] *ABA Resolution 10C*, at 1 (2017), http://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/10c.pdf.

The Government contends that this sweeping exercise of authority by the President is simply unreviewable by this Court—that this Court can neither examine the Order to determine whether it complies with Congress's dictates nor look beyond the four corners of the Order to consider its Establishment Clause implications. That position cannot be reconciled with this Court's precedent and with the rule of law. The ABA accordingly submits this brief to urge this Court to reject the Government's argument that it should abdicate its role and, instead, to exercise its full power of judicial review to preserve and enforce fundamental constitutional and statutory limits on Executive power.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Executive Order at issue here suspends entry into the United States by all nationals of six almost entirely Muslim countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen—for 90 days, subject to certain case-by-case waiver provisions. J.A. 1425-29. It likewise suspends entry of all refugees and decisions on applications for refugee status for 120 days, with a similar waiver process on a case-by-case basis. J.A. 1433-34. The suspension of entry purportedly serves to permit the Department of Homeland Security and other agencies to review screening and vetting procedures for entry of foreign nationals. *See* J.A. 1425.

As authority for this action, the Order relies on section 212(f) of the Immigration and Nationality Act ("INA"), Pub. L. 82-414, which states that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). Echoing the language of § 1182(f), the Order states that "unrestricted entry into the United States of nationals" of the six countries "would be detrimental to the interests of the United States." J.A. 1426.

I. The Government contends that this Court may not even consider whether § 1182(f) in fact gives the President the authority he claims. It contends that the exclusion of aliens is committed entirely to the political branches and that Congress accordingly may delegate to the President sweeping authority that can be exercised without any review by the courts. *See* Pet'rs Br. 22-27.

This Court should reject the Government's attempts to insulate the Order from review. To be sure, judicial deference to the political branches' judgments regarding immigration—particularly to the extent those judgments implicate delicate questions of foreign relations—may be appropriate in certain circumstances. But deference does not justify

abdicating the duty of judicial review. Accepting the Government's position would eviscerate the most fundamental task of this Court: to say what the law is, even when that law touches on sensitive subjects like foreign relations and national security. This Court has regularly reviewed Executive action to ensure that it is within statutory and constitutional bounds, and invalidated it where necessary, even in wartime.

The cases on which the Government relies articulating the doctrines of plenary power and "consular nonreviewability" are not to the contrary. Even to the extent the plenary power cases retain their full force today—and they are difficult to square with this Court's more recent precedent—they do not stand for the proposition that this Court can never address the limits of Executive power in the immigration context. And the consular nonreviewability cases articulate a narrow rule governing aliens' individual challenges to their exclusion. They are inapposite here.

II. Nor should the Court accept the Government's reading of § 1182(f) as granting the President unilateral and unreviewable authority. While the provision's language appears broad read in isolation, when it is examined in the context of the statute as a whole—as basic principles of statutory construction require—it becomes clear that the Government's interpretation of § 1182(f) would make a hash of the rest of the statutory scheme.

The Government's reading transforms significant portions of a complex statute into surplusage. The INA contains provisions designed to address the precise problems at which the Order ostensibly aims. Congress has enacted elaborate provisions designed to exclude persons associated with terrorist activities or organizations from obtaining a visa for entry to this country. And in 2015, Congress amended the INA to ensure that nationals of, or recent visitors to, the six countries addressed in the Order would have to undergo that thorough vetting and could not take advantage of the visa waiver program available to other foreign nationals. In doing so, Congress expressly declined to adopt a travel ban, concluding that existing vetting procedures and the limitation of the visa waiver program sufficed. Section 1182(f) should not be read to permit the President to overturn Congress's judgment. Moreover, on the Government's reading, § 1182(f) would permit the President to override the INA's historic prohibition of national-origin discrimination in the issuance of immigrant visas.

The Government's interpretation of § 1182(f) also raises serious constitutional questions, including separation-of-powers questions. It would collapse all power over the exclusion of aliens into a single branch of government, contrary to our constitutional structure of divided powers. And it would give the President the power to discriminate—for instance, on the basis of race, religion, or sex—in a way that would be prohibited in any other context and that implicates our most fundamental values as a nation.

This Court should interpret § 1182(f) narrowly, and read it to permit judicial review, to avoid those constitutional questions.

III. The Court should also reject the Government's contention that, in reviewing respondent's Establishment Clause challenge to the Order, the Court should restrict its inquiry to the four corners of the Order. Where, as here, the President himself and his advisers have repeatedly made clear that the Order is intended as a "Muslim ban," this Court need not and should not ignore those statements in determining the Order's constitutionality.

ARGUMENT

I. THIS COURT SHOULD REJECT THE GOVERNMENT'S ARGUMENT THAT THE ORDER CANNOT BE REVIEWED FOR COMPLIANCE WITH THE INA

A. Reviewing Executive Action For Compliance With Congressional Commands Is An Essential Judicial Role Even When National Security Is At Issue

The Government asserts that this Court may not review the President's actions to determine whether they are consistent with Congress's mandate in the INA. That position contravenes the judiciary's fundamental role—to "say what the law is" and whether it has been complied with. *Marbury*

v. *Madison*, 5 U.S. 137, 177 (1803). As Chief Justice Marshall explained, where the Court is asked to apply a statute to a particular case, the Court "must of necessity expound and interpret" that statute. *Id.* Such statutory interpretation is "the very essence of judicial duty." *Id.* at 178. And courts cannot avoid that duty merely "because the issues have political implications." *INS* v. *Chadha*, 462 U.S. 919, 943 (1983).

To the contrary, resolving questions of statutory interpretation—and thereby determining whether the executive branch is complying with Congress's dictates—is a core judicial responsibility, even where the question implicates sensitive issues of foreign policy or national security. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 196 (2012). Zivotofsky sought to enforce a statute that permitted citizens born in Jerusalem to request their birthplace be identified as "Israel" rather than "Jerusalem" on their passports, notwithstanding contrary State Department policy. The Government argued that the dispute was nonjusticiable because it implicated the President's authority to speak for the Nation in international affairs, and specifically the Executive's policy of neutrality in the Israeli-Palestinian dispute over the status of Jerusalem. This Court rejected that argument:

> The federal courts are not being asked to supplant a policy decision of the federal branches with the courts' own unmoored determination of what United States

> policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Id.

So too here. This Court is not being asked to determine appropriate immigration policy by itself and without standards. Rather, it is being asked to determine whether the Order comports with Congress's mandate in the INA—a quintessential judicial task.

Indeed, this Court has long understood its responsibilities to include restraining exercises of executive power not authorized by Congress, even in wartime and when national security is at issue. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), for example, the Court famously struck down President Truman's executive order directing the Secretary of Commerce to seize steel mills to avoid a strike that the President believed would cripple the national defense and imperil his ability as Commander-in-Chief to prosecute the Korean War. Applying ordinary tools of statutory interpretation, the Court concluded that Congress had not authorized the seizure; rather, by adopting very different schemes for resolving labor disputes, it had

implicitly precluded the President from exercising such power. *Id.* at 585-86; *id.* at 602 (Frankfurter, J., concurring). The executive order's finding of a national security crisis neither prevented this Court from reviewing the Order's compliance with Congress's dictates nor excused the President from obeying them. *See id.* at 588-89; *see also Dames & Moore v. Regan*, 453 U.S. 654, 675-76 (1981) (reviewing scope of President's statutory authority to direct transfer of Iranian assets and suspend pending suits as part of settlement of claims against Iran following Iranian hostage crisis).

Similarly, in a more recent wartime dispute over the scope of executive power, this Court reviewed and held unlawful the procedures of a military commission convened to try an alleged enemy combatant held at Guantanamo for conspiracy to commit terrorism. *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 567 (2006). The Court first rejected the Government's argument that it should abstain from hearing Hamdan's challenge until the military commission proceedings were complete, declining to presume that the proceedings would vindicate Hamdan's constitutional rights. *Id.* at 586-87. Exercising its ordinary function of statutory interpretation, the Court concluded that the military commission did not comply with Congress's mandate in the Uniform Code of Military Justice ("UCMJ") requiring that such a commission's procedures be the same as those applied to formal courts-martial "insofar as practicable." *Id.* at 620-23 (quoting 10 U.S.C. § 836(b)). The President had determined that

it was "impracticable" for military commissions to comply with formal court-martial rules, but this Court found that the President had not made the necessary showing of impracticability. *Id.* at 623. Again, the Government's pleas of exigency were insufficient to prevent this Court from either scrutinizing executive action for consistency with Congress's direction or examining the sufficiency of the underlying record.

In short, this Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder* v. *Humanitarian Law Project*, 561 U.S 1, 34 (2010).

B. Neither the "Plenary Power" Nor The "Consular Nonreviewability" Doctrine Supports The Government's Position

There is no constitutional or prudential reason that this Court should have a more limited role in disputes involving the scope of the executive's power over immigration than it does in other cases, such as those discussed above, implicating sensitive questions of foreign policy or national security.

The Government relies on two lines of cases in support of its contention that the Order is unreviewable. Neither is applicable here.

1. The Government cites cases articulating what is generally known as the "plenary power"

doctrine—which the Government characterizes as holding that the political branches' power to exclude aliens is essentially unreviewable by the courts. Pet'rs Br. 22-23. Even to the extent those cases retain their full validity today—which is questionable—the Government reads them too broadly, and they fail to support the notion that the Order is immune from judicial review.

As an initial matter, the Government fails to acknowledge the most basic point regarding the plenary power doctrine: Decisions regarding immigration are committed to *Congress*, not to the President. *See Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (the formulation of policies "pertaining to the entry of aliens and their right to remain here" is "entrusted exclusively to Congress"); *see also Arizona* v. *United States*, 567 U.S. 387, 409 (2012). This principle is "as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan*, 347 U.S. at 531. The question presented in this case is not the wisdom of the policy Congress articulated—or even the wisdom of the policy the President articulated—but whether the Order is within the power Congress granted the President in the first place. As discussed above, that is the kind of question this Court is uniquely competent to resolve.

The cases on which the Government relies are not to the contrary. In *Fiallo* v. *Bell*, 430 U.S. 787 (1977), for example, the Court was not presented with the question whether an executive action

comported with Congress's dictates, but with the constitutionality of Congress's choice to distinguish between nonmarital children's relationships with their mothers and their relationships with their fathers in granting preferential immigration status. The Court addressed the question, concluding that such a distinction was reasonable and within Congress's constitutional authority. *Id.* at 799-800. It nowhere suggested that courts could not determine whether the President had acted within the powers Congress granted him, and such a suggestion would fly in the face of long-standing precedent such as *Youngstown* and its progeny.

Similarly, the Government relies on dicta in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952), which upheld deportations of past members of the Communist Party under the Alien Registration Act, to the effect that "any policy toward aliens is . . . interwoven with . . . the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 588-89; *see* Pet'rs Br. 23. *Harisiades* did not, however, rely on that language to foreclose judicial review of the deportation orders in question, engaging—though rejecting—the deportees' constitutional challenge to the statute. *See Harisiades*, 342 U.S. at 583-84. Again, no challenge to *executive* authority was raised.

Undoubtedly, the plenary power doctrine—along with the McCarthy-era terror of Communism—had a role in driving the substantive constitutional analysis in *Harisiades* and similar cases such as *Galvan*. But the extreme reluctance in *Harisiades* and like cases to "deny or qualify the Government's power of deportation" by imposing due process limitations on that power, 342 U.S. at 591, cannot be squared with this Court's more recent precedent.

The Court has not hesitated in recent years to address challenges to the government's power of deportation and related immigration issues and to uphold those challenges where appropriate. In *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001), for example, the Court applied constitutional avoidance principles to construe the INA to impose a "reasonable time" limitation on detention of removable aliens, whose application was reviewable in federal court. The Court observed that "the Due Process Clause protects an alien subject to a final order of deportation," and that Congress's plenary power over immigration is "subject to important constitutional limitations." *Id.* at 693-95. Finding that indefinite detention would raise serious due process concerns, and locating no clear statement in the statute that Congress intended to authorize it, the Court held that indefinite detention is not authorized. *Id.* at 699. The Court also rejected the Government's argument that the federal courts must defer to the Government's decision that a particular detention is reasonable. Notwithstanding "the greater immigration-related expertise of the

Executive Branch," determining whether a particular detention is reasonable and thus authorized by statute is the job of the courts. *Id.* at 699-700. The same logic applies *a fortiori* here, where individualized decision-making is not at issue, but simply the scope of the Executive's rulemaking authority.

2. The Government also relies on cases involving the so-called "consular nonreviewability" doctrine. Pet'rs Br. 24-25. Despite the Government's casual attempt to expand that doctrine into a broad prohibition on review of all immigration-related decisions, *id.* at 25, those cases articulate a narrow exception to the general principle of reviewability of agency action. Under that exception, "a consular official's decision to issue or withhold a visa" to a specific alien seeking entry to the United States is committed to that officer's discretion and thus not reviewable absent Congress's express authorization. *See Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159-60 (D.C. Cir. 1999). Most of the decisions the Government cites fall into that category. *See Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950); *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892). In each case an alien seeking entry to the United States and detained at the border sought review by habeas corpus of the individual decision to exclude him or her.

These cases are irrelevant here for two reasons. First, the plaintiffs were aliens outside the United States contesting their own exclusion, not—as here—United States citizens, residents, or entities contesting the exclusion of persons in whose admission they have an interest. Second, the question here is not whether a consular official has reasonably exercised the discretion Congress has granted him, but whether the President has acted pursuant to any statutory authority.

For the same reasons, the Government's contention that Congress has precluded judicial review of the Order fails. The Government notes that Congress has expressly declined to create a private right of action to challenge "a decision . . . to grant or deny a visa" or to revoke a visa. Pet'rs Br. 25 (quoting 6 U.S.C. § 236(f)). But Respondents here are not challenging "*a* decision . . . to deny *a* visa"; they challenge an order preemptively forbidding entry by a group of more than 180 million people defined by their nationality and religion, subject to burdensome case-by-case waiver procedures.

The Order at issue here is far from a run-of-the-mill exercise of discretion over entry of an individual alien. It is extraordinary and unprecedented: a presumptive bar for a significant period on entry of *all* nationals of six overwhelmingly Muslim countries and *all* refugees, candidly referred to by the President and his advisors as a "Muslim ban." *See* Resp't Hawaii Br. 5-7; J.A. 1133. The Court should reject the Government's contention

that it cannot even consider whether this was Congress's intent.

II. THE INA SHOULD NOT BE READ TO GRANT THE PRESIDENT UNTRAMMELED DISCRETION TO EXCLUDE A CLASS OF ALIENS FOR ANY REASON

The Government contends that the President's action is authorized by section 212(f) of the INA, which provides that the President may "suspend the entry of all aliens or any class of aliens" whose entry he finds "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). That provision does not grant authority for the Order.

To be sure, the language of § 1182(f) is broad. But that does not mean that it grants the President absolute discretion to exclude any group of persons for any reason, as the Government would have it. As this Court recognized long ago in the immigration context, "[a] restrictive meaning for what appear to be plain words may be indicated by [the INA] as a whole, by the persuasive gloss of legislative history or by the rule . . . that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts." *United States* v. *Witkovich*, 353 U.S. 194, 199 (1957). That is true here. *First*, the Government's interpretation of § 1182(f) would nullify significant portions of a complex and reticulated statutory scheme, including provisions Congress enacted to address the precise problems at which the Order is purportedly directed, and would

override Congress's considered judgment *not* to institute the travel ban the Order imposes. *Second*, such an interpretation would raise serious constitutional concerns, as it would imply a delegation to the President of sweeping power over immigration—including the power to engage in discrimination on the basis of race, sex, and religion that would not be tolerated in any other context—without any discernible standards for exercising that power or any check on its exercise. The application of those principles here makes clear that Congress has not granted the President the authority he claims.

A. The Government's Interpretation of Section 1182(f) Is Incompatible With the Statutory Scheme As A Whole

The Government's reading of § 1182(f) would render much of the remainder of Congress's careful scheme in the INA—which includes specific provisions dealing with precisely the national security issues the Order claims to address—surplusage. Even more strikingly, it would contravene Congress's specific judgment *not* to impose a travel ban on nationals of the six countries at issue, but instead to institute more carefully tailored precautions. And it would violate the express repudiation of national-origin discrimination in immigration that has been a centerpiece of the INA since 1965.

1. Congress has not sat idly, failing to address the risk of domestic terrorism potentially posed by admitting aliens from countries that have been known to harbor terrorists. In 2015, Congress enacted a law designed to address precisely that concern, the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015. *See* Consolidated Appropriations Act, 2016, Pub. L. 114-113 div. O, tit. II (2015) (codified at 8 U.S.C. § 1187(a)(12)) ("Visa Waiver Act" or "Act").

The Act modified the existing visa waiver program, under which aliens in certain categories—such as those seeking short-term entry as a tourist, 8 U.S.C. § 1187(a)(1), having completed immigration forms, *id.* § 1187(a)(4), or having a round-trip ticket, *id.* § 1187(a)(8)—are not required to obtain a visa for entry. It provided that nationals of, or persons recently present in, the six countries identified in the Order, along with Iraq, are not eligible for the visa waiver program because of those countries' ties to terrorism. *Id.* § 1187(a)(12).[7] Accordingly, those persons will receive the full vetting necessary to receive a visa—vetting meticulously designed to exclude foreign nationals suspected of any association with terrorist activity or organizations,

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[7] Syria and Iraq are specifically designated in the Act; the other five countries have been designated by the Secretary of State or Secretary of Homeland Security under authority granted by the Act. *See* 8 U.S.C. § 1187(a)(12)(A).

and updated multiple times since September 11, 2001 to address new concerns. *See id.* § 1182(a)(3)(B); USA PATRIOT ACT of 2001, Pub. L. 107-56; REAL ID Act of 2005, Pub. L. 109-13.

The Visa Waiver Act, however, does not impose a ban on entry by all nationals of the countries at issue. That was not an oversight, but a deliberate choice expressly discussed during debate over the bill. As Representative Lofgren, one of the bill's supporters, stated in debate on the bill:

> For those who have traveled to or are nationals of certain high-threat countries, a visa interview, rather than visa-free travel, will be required. *These individuals are not barred from traveling to the United States.*

177 CONG. REC. H9050 (daily ed. Dec. 8, 2015) (statement of Rep. Lofgren) (emphasis added). Similarly, while opponents of the bill criticized it as overbroad and discriminatory, they still understood it as limited to subjecting affected persons to additional screening measures prior to entry. *See, e.g., id.* at H9051 (statement of Rep. Conyers) ("I understand that these individuals are not banned from traveling to our Nation and are simply subject to increased questioning and scrutiny before they can travel here."); *id.* at H9057 (statement of Rep. Ellison) ("While this bill does not restrict entry to the U.S., it creates additional barriers.").

On the Government's reading, then, § 1182(f) permits the President to override Congress's deliberate decision not to impose a travel ban on nationals of exactly the six countries at issue. And it renders Congress's carefully crafted remedy in the Visa Waiver Act a nullity, since the President is free to impose the more drastic measure of a travel ban on nationals or residents of any country.

It need hardly be said that such a reading contravenes basic principles of statutory interpretation. This Court typically will not read a statute in a way that renders another part of the statute superfluous. *See, e.g., Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004). Relatedly, where a general provision and a specific provision of a statute are addressed to the same problem, the specific provision takes precedence over the general provision. *See, e.g., RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012) ("[T]he specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence."). Here, Congress set out a careful and reticulated scheme, developed over many years, specifically designed to address the domestic terrorism risk posed by entry of nationals of the countries at issue. Interpreting the INA to permit the Order renders all of those labors superfluous, *see, e.g., Abourezk* v. *Reagan*, 785 F.2d 1043, 1056-58 (D.C. Cir. 1986) (Ginsburg, J.) (putting a limiting construction on the Executive's power to exclude

certain aliens under one subsection of § 1182(f) in order to avoid rendering another subsection surplusage), and permits the general provision to override the specific.

Most significantly, that interpretation of the statute turns on its head Congress's deliberate decision *not* to impose a travel ban. There is no reason to believe Congress intended to delegate to the President a power to cast aside all the meticulously developed specifics of the INA in this manner. Just as in *Youngstown*, *see* 343 U.S. at 586-88, by adopting a specific scheme for addressing terrorism concerns that does not include a travel ban, Congress has precluded the President from doing so on his own.[8]

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[8] The scope of the President's authority under § 1182(f) is also illuminated by historical practice. See *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President.") (internal quotation marks and citation omitted); *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring) (noting that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President" by the Constitution). In the few instances where other presidents have invoked Section 1182(f), the suspension of nationals

2. On the Government's interpretation, § 1182(f) would also run afoul of the bar on national-origin discrimination in § 1152 of the statute—a key piece of civil-rights-era legislation specifically designed to repudiate the then-existing national origin quota system for immigration. Section 1152 provides:

> [N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1)(A).

The bill ultimately codified in § 1152 was intended "fundamental[ly] [to] reform . . . the national origins system of selecting immigrants." Letter of Transmittal from President John Kennedy to Vice President Lyndon Johnson and Speaker of the House John McCormack, 1 (July 23, 1963). President Kennedy's transmittal letter emphasized

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from a particular country was in response to specific and articulable foreign policy events or other reasons having nothing to do with invidious discrimination based on nationality. Unlike the situation here, none of those actions branded the foreign nationals threats to public safety based solely on their nationality. *See* J.A. 1215-16; Resp't Hawaii Br. at 45-46.

that "[t]he use of a national origins system is without basis in either logic or reason," and that the new legislation would help "in developing an immigration law that serves the national interest and reflects in every detail the principles of equality and human dignity to which our nation subscribes." *Id.* at 1-2.

Senator Philip Hart described the "principal effort" behind the bill as "the elimination of a mistake that was made in the twenty's and has lived with us ever since in this business of the national origins quota system." *Immigration: Hearings on S. 500 Before the Subcomm. on Immigration and Naturalization of the S. Comm. on the Judiciary*, pt. I, 89th Cong. 4 (1965) (statement of Sen. Philip Hart, Member, S. Subcomm. on Immigration and Naturalization). Similarly, Attorney General Nicholas Katzenbach told the House Committee:

> Under present law, we choose among potential immigrants not on the basis of what they can contribute to our society . . . . We choose, instead, on the basis of where they . . . happened to be born. There is little logic or consistency in such a choice . . . when we proclaim to all the peoples of the world that every man is born equal and that in America every man is free to demonstrate his individual talents.

Id. at 8 (statement of Nicholas Katzenbach, Att'y Gen. of the United States). The House Report

likewise explained that the new legislation was intended to "eliminat[e] . . . the national origins system as the basis for the selection of immigrants" and replace it with "a new system of selection designed to be fair, rational, humane, and in the national interest." H.R. REP. NO. 89-745, at 8, 12 (1965).

The Order on its face violates § 1152's prohibition on "discriminat[ion] in the issuance of . . . immigrant visa[s] because of the person's . . . nationality" by denying entry to the United States (including entry as an immigrant) solely on the basis that a person is a national of one of the six identified countries. *See* 8 U.S.C. § 1152(a)(1)(A).

The Government acknowledges—as it must—that § 1152 prohibits national-origin discrimination in the issuance of immigrant visas. It nevertheless argues that § 1182(f) empowers the President to ban "entry" on the basis of nationality. "[I]f an alien is subject to Section 2(c) . . . , he is denied an immigrant visa because he is ineligible to receive one as someone barred from entering the country under Section 1182(f)—not because he is suffering the type of nationality-based discrimination prohibited by Section 1152(a)(1)(A)." Pet'rs Br. 52. This is sophistry. The *reason* such an alien is ineligible to receive an immigrant visa is because he is barred from entering the country based on his nationality.

Indeed, the Government's interpretation would render Section 1152 entirely meaningless. It

would enable the President to override Congress's ban on racial, nationality and gender discrimination in the issuance of immigration visas by simply banning entry for the same discriminatory reasons. That cannot have been what Congress intended in enacting § 1152. Rather, under longstanding principles of statutory interpretation, the specific ban on national-origin discrimination in the issuance of immigrant visas must be treated as an exception to the general power to exclude classes of aliens. *See RadLAX*, 566 U.S. at 645. The alternative reading makes § 1152—a historic and much-heralded repudiation of national-origin quotas—a nullity.

B. The Government's Reading Of Section 1182(f) Raises Grave Constitutional Concerns

The INA, like other statutes, must be interpreted, where possible, to avoid constitutional concerns. *See Zadvydas*, 533 U.S. at 689 ("It is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (internal quotation marks, citation, and brackets omitted)). Thus, in *Zadvydas*, as discussed above, the Court construed a provision of the INA that arguably provided broad authority to detain a deportable alien indefinitely to include an implicit limitation to a reasonable time period. *Id.* And in *Witkovich*, the Court construed a grant of power to

the Attorney General to require aliens with outstanding deportation orders to provide whatever information he "may deem fit and proper" as limited to information reasonably necessary to keep him informed of their availability for departure. 353 U.S. at 195-202. In both cases, the Court adopted a narrowing construction of language that "if read in isolation and literally, appears to confer upon the Attorney General unbounded authority" to avoid the constitutional concerns that would otherwise result. *Id.* at 199; *see id.* at 200-01.

The Government's reading of § 1182(f) as granting the President absolute and unreviewable discretion to exclude any or all aliens for any reason and any length of time he wishes likewise raises serious constitutional questions, including separation-of-powers concerns.

The Constitution confers power over immigration matters in the first instance on Congress, not the President. *See* U.S. Const., art. I, § 8, cl. 4 (granting Congress the power "[t]o establish [a] uniform Rule of Naturalization"); *id.*, art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations"); *Arizona*, 567 U.S. at 409 ("[p]olicies pertaining to the entry of aliens" are the "exclusive[]" province of Congress" (internal quotation marks and citation omitted)). Congress may, of course, delegate portions of that authority to the President, accompanied by some discernible principle to guide its exercise—but the President may not arrogate it all to himself and wield it at his

whim. Such an assertion of absolute power must—at the very least—"be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

These separation-of-powers concerns are compounded by the Government's position that the President's actions are immune from judicial review—an approach that "condense[s] power into a single branch of government," in contravention of our fundamental system of checks and balances. *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) (examining both the statutory authorization for executive detention of enemy combatants and the constitutional limitations on its exercise) (emphasis omitted). "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.*

The Government contends that Congress should be presumed to have barred the courts from reviewing the President's actions to determine whether they are authorized, absent an express statement to the contrary. Pet'rs Br. 24-25. It apparently draws that proposition from the narrow line of consular non-reviewability cases discussed above, *see supra* Part I.B.2. As a general matter, however, this Court has held that such presumptions run the other way. Congress is not presumed to

push the envelope of constitutionality. *See Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *cf. Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (in federalism context, requiring clear statement before statute is interpreted to "upset the usual constitutional balance"). And ambiguities are resolved in favor of readings that do not create constitutional concerns—including concerns posed by the preclusion of judicial review. *See, e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001) (in the context of habeas review of removal orders, holding that "[a] construction of the [INA] that would entirely preclude review of a pure question of law [including a statutory question] by any court would give rise to substantial constitutional questions.").

This case does not, like *St. Cyr*, raise Suspension Clause concerns. But it surely does raise the serious concerns associated with "condens[ing] power into a single branch of government." *Hamdi*, 542 U.S. at 536. And it is also troubling that the Government appears to recognize no limitation on the President's ability to exclude aliens for discriminatory reasons—such as race and religion—that in other contexts would clearly be forbidden, and that would change the character of our Nation.

These concerns are heightened yet further by the specifics of the Order here. The Order attempts to justify its blanket ban on entry by nationals of the six designated countries and by refugees as necessary to protect the Nation from acts of

terrorism pending the Administration's review of vetting procedures. But that justification is weak at best. The Order provides no instance of any national of five of the six designated countries engaging in an act of terrorism, and the only example it gives from the remaining country, Somalia, is of a national who entered as a two-year-old, became a citizen, and was later radicalized here. *See* J.A. 276. As the courts below noted, the Department of Homeland Security has found no meaningful relationship between citizenship of a foreign nation and proclivity to commit terrorist acts; and former national security officials from both Republican and Democratic Administrations have rejected any simple equation between nationality and the potential for terrorism. *See* J.A. 178, 1226. Moreover, the Order does not demonstrate any weakness in existing vetting procedures that necessitates a blanket ban on entry while they are reconsidered.

Combined with the repeated statements, described in Respondents' briefs and by the courts below, that the Order and its predecessor were intended to implement a "Muslim ban," the thinness of the putative justification for the Order gives pause. And it puts in stark relief the consequences of accepting the Government's assertion that the President's power is unilateral and unreviewable. The Court should reject that argument and construe § 1182(f) to avoid the serious constitutional doubts the Government's reading raises.

III. THIS COURT SHOULD NOT LIMIT ITS ESTABLISHMENT CLAUSE INQUIRY TO THE ORDER'S ASSERTED PURPOSE

Should this Court reach the Establishment Clause question, it should reject the Government's argument that its inquiry is limited to examining the four corners of the Order to determine whether it provides a "facially legitimate and bona fide reason" for its terms. *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972). The Government contends that so long as the Order itself articulates some colorable national security rationale, this Court is precluded from inquiring any further into the underlying motives for and effects of the ban. Whatever the merits of that analysis in the ordinary case, this is no ordinary case. The record contains substantial evidence that the Order was motivated by a desire to ban entry of Muslims. This Court is not required to, and should not, ignore that evidence.

Kleindienst certainly imposes no such requirement. There, the question was whether the Government had articulated a sufficient basis for burdening the plaintiffs' First Amendment right to hear the speaker who was excluded. In that context, this Court concluded that it would be undesirable for courts to "be required to weigh the strength of the audience's interest" in hearing a speaker "against that of the Government in refusing a waiver to the particular alien applicant" on a case-by-case basis. *Id.* at 769. But those concerns are not implicated here. The Order is a sweeping proclamation

presumptively excluding over 180 million people, not an individualized determination to exclude a particular person that incidentally burdens a U.S. citizen's rights. Equally importantly, *Kleindienst* involved no evidence of unconstitutional motive like that here. Where, as here, a litigant offers a prima facie "affirmative showing of bad faith" and unconstitutional motivation on the part of the Government, this Court should take that showing into account in determining the validity of the challenged action. *See Kerry* v. *Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring). Respondents' Establishment Clause claim deserves this Court's serious and full consideration, including examining the Order in the context of the entire record. When the President and his advisors themselves casually acknowledge their intent to implement a "Muslim ban," the threat to our constitutional values requires nothing less.

CONCLUSION

This Court should affirm the judgments below.

Respectfully submitted,

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September 18, 2017